MASERBA SDN BHD

v.

LOWE MOTOR SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-304-96]
14 APRIL 1998

CIVIL PROCEDURE: *Pleadings - Striking out - Order 18 r. 19(1)(a) Rules of the High Court 1980 - No affidavit evidence - Only pleadings - Whether plain and obvious case*

The plaintiff commenced an action against the eleven defendants. However, the action was withdrawn by consent as against the 4th to 6th defendants. Meanwhile, the remaining defendants filed an application to strike out the plaintiff's claim under O. 18 r. 19(1)(a), (b), (c) & (d) Rules of the High Court 1980 ('RHC'). When the application was heard before the SAR, the parties only argued on ground (a), *ie*, no reasonable cause of action. The SAR allowed the application and the plaintiff appealed.

Held:

[1] The SAR ought not to have read the affidavits supporting or opposing the application as O. 18 r. 19(2) RHC mandates that only pleadings ought to be considered for the purpose of determining whether a claim discloses a reasonable cause of action.

[2] Upon a consideration of the pleadings here alone, it was not plain and obvious that plaintiff's action was unsustainable and had no chance of success.

[Appeal allowed.]

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. UMBC [1993] 4 CLJ 7 ***(refd)***
Breeze Navigation Co SA v. 'Hsing An' Owners [1974] 1 MLJ 45 ***(refd)***
Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***
Drummond-Jackson v. British Medical Association & Ors [1970] 1 WLR 688 ***(refd)***
Gan Hong Hoe v. Gan Kim Hee [1939] MLJ 295 ***(refd)***
Henry Wong Jan Fook v. John Lee & Anor [1976] 1 MLJ 231 ***(refd)***
MBf Finance Bhd lwn. Sykt Noma Pengangkutan Sdn Bhd & Yang Lain [1999] 4 CLJ 234 ***(refd)***
New Straits Times (Malaysia) v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(foll)***

Penang Development Corporation v. Khaw Chin Boo & Anor [1993] 3 CLJ 167 ***(refd)***
Re Kwan Chew Shen t/a Sykt Kaaf [1987] 1 CLJ 314 ***(refd)***
Sea Breeze Navigation Co SA v 'Hsing An' Owners [1974] 1 MLJ 45 ***(refd)***
The Topps Co Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ Supp 235 ***(refd)***
Tun Datuk Hj Mustapha Datuk Harun v. State Legislative Assembly of Sabah [1993] 1 MLJ 26 ***(refd)***
Yango Pastoral Co Pty v. First Chicago Australia Ltd [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(d), 54, 109(m)(ii), 125, 127
Companies Act 1965, ss. 127, 133(1), (5), 162
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Balasundram Kanagaratnam; M/s Balasundram & Co
For the defendant - KP Tan; M/s Tan Yu & Co

Reported by Izzaty Izzuddin

JUDGMENT

Jeffrey Tan J:

This is the plaintiff's appeal (encl. 36) to judge-in chambers against the decision of the learned senior assistant registrar, striking out the plaintiff's claim, on the defendants' application (encl. 16), under O. 18 r. 19 of the Rules of the High Court 1980. Incidentally, the plaintiff's claim against the 4th – 6th defendants was struck off, by consent, on 7 July 1997, and all reference hereinafter to defendants, save as otherwise stated, shall refer only to the remaining defendants.

Ostensibly, so reading encl. 16, the defendants had applied to strike out the plaintiff's claim on grounds (a) to (d) under sub-r. (1) and under the inherent jurisdiction of court. But both learned counsel enlightened the court, when they argued this appeal, that encl. 16 was only argued on ground (a) before the learned SAR. Then the learned SAR ought not have read, with respect, the affidavits supporting or opposing encl. 16, as was apparently the case, as r. 19(2) mandates that "no evidence shall be admissible on an application under para. (1)(a)". Only pleadings ought to have been considered for the purpose of determining whether the claim discloses a reasonable cause of action and defence (see *New Straits Times (Malaysia) v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor* [1985] 1 MLJ 226).

The plaintiff pleaded as follows. At all material times, the plaintiff, a company incorporated in Malaysia, acted through its manager, one Lim Hun Kiang, an undischarged bankrupt. The 1st defendant, the local

concessionaire for the Mercedes-Benz and Mazda marques, had a fully paid up capital of RM907,500 divided into 907,500 ordinary shares of RM1 each. The 2nd defendant was the secretary of the 1st defendant. The 3rd defendant, the accountant of the 1st defendant, acted as advisor, "middleman" and stakeholder in the sale of the share capital of the 1st defendant. By an agreement of date not known to the plaintiff, the 4th (an advocate & solicitor), 5th and 6th defendants purchased the entire share capital of the 1st defendant. The 4th and 5th defendants entered into the said agreement purchasing the said shares as agents and or nominees of the plaintiff, 7th, 9th and 11th defendants, and in the following proportion: (a) Plaintiff – 10%, (b) 9th defendant – 5%, (c) 7th defendant – 25% and, (d) 11th defendant – 60%. The purchase of the said shares in the said proportion was agreed to after several meetings held in November 1995 between Lim Hun Kiang representing the plaintiff, Dato' Low Hock Peng representing himself and the 9th defendant, Tan Sri Tan Kok Ping representing himself and the 5th, 6th and 11th defendants. It was also agreed, *inter alia*, that in recognition of the "important role" played by Lim Hun Kiang, by "introducing" the purchase of the said shares that all parties shall pay a brokerage commission of RM500,000 to the plaintiff, the principal of Lim Hun Kiang, as agreed, all parties deposited their respective purchase consideration and brokerage commission (together RM5,035,025) with the stakeholder – the 3rd defendant. The purchase consideration of the said shares was RM4,535,025, and the balance RM500,000 was the brokerage commission to be paid to the plaintiff. In February 1996, the purchasers took over the management of the 1st defendant company, and the 5th – 8th defendants were appointed directors of the 1st defendant company. Towards the end of February 1996, a brokerage commission of RM500,000 was paid, by the 3rd defendant with the consent of the purchasers, to the plaintiff, out of the total sum deposited with the 3rd defendant. Towards the end of March 1996, personal differences had arisen between Lim Hun Kiang and the 7th defendant, and the 7th defendant wrongly accused Lim Hun Kiang of having cheated in the purchase of the said shares. On 6 June 1996, the plaintiff requested, from the 2nd defendant, for the shares it had purchased. On 14 June 1996, the 2nd defendant informed the plaintiff that the plaintiff was not a holder of shares in the 1st defendant company. On 26 August 1996, the plaintiff discovered that the issued share capital of the 1st defendant company was registered as follows: (a) 8th defendant – 1 share, (b) 7th defendant – 1 share, (c) 5th defendant – 1 share, (d) 6th defendant – 2 shares, (e) 11th defendant – 898,000 shares, and, (f) Tan Koon Gaik – 9,000 shares. The plaintiff is not aware of the circumstances leading to the registration of 898,000 shares unto the 11th defendant. The plaintiff is the legal and beneficial holder of 90,750 shares in the capital of the 1st defendant company.

Against all defendants, the plaintiff seeks, (a) a declaration that the plaintiff is the beneficial holder and owner of 90,750 shares in the capital of the 1st defendant company, (b) an order, under s. 162 of the Companies Act 1965, rectifying the register of the members of the 1st defendant company, and entering the plaintiff, in the register, as holder of 90,750 shares in the capital of the 1st defendant company, and, (c) alternatively, any other suitable order correcting the register of the members of the 1st defendant company.

Against the 1st, 2nd, 3rd, 7th, 8th, and 11th defendants, the plaintiff seeks an injunction restraining any transfer of the shares and the registration of any transfer of new shares until the disposal of this suit. Against the 1st, 7th, 8th, 9th and 10th defendant, the plaintiff seeks general damages for breach of agreement. And against the 2nd and 3rd defendants, the plaintiffs seeks general damages for breach of their respective duties, as secretary and as stakeholder.

All in all, the defendants filed, either jointly and or severally, five identical defences. The defendants pleaded as follows. The defendants have no knowledge that the plaintiff was a company incorporated in Malaysia and or that the plaintiff had acted through its manager, one Lim Hun Kiang, an undischarged bankrupt. As an undischarged bankrupt, the said Lim Hun Kiang could not do any of the alleged acts on behalf of the plaintiff, and the plaintiff and or Lim Hun Kiang could not rely on those alleged acts, which even if true did not constitute any contract, to file this action against the defendants. Furthermore, all payments made earlier by the said Lim Hun Kiang had been refunded by the then prospective purchasers to the plaintiff, and which refund had been accepted by the plaintiff and Lim Hun Kiang. Even if the alleged acts constituted an agreement, that agreement was void and need not be performed. The 1st defendant, the local concessionaire for the Mercedes-Benz and Mazda marques, had a fully paid up capital of RM907,500 divided into 907,500 ordinary shares of RM1 each. The 3rd defendant did not act as advisor, "middleman" and stakeholder in the sale of the share capital of the 1st defendant, and the defendants put the plaintiff to strict proof that the 3rd defendants had so acted. "The plaintiff had no interest in or any business to do with the purchase of the shares ...". The defendants have no knowledge (a) that the 4th and 5th defendants had entered into the said agreement purchasing the said shares as agents and or nominees of the plaintiff, 7th, 9th and 11th defendants, and in the alleged proportion, (b) that the purchase of the said shares in the said proportion was agreed to after several meetings held in November 1995 between Lim Hun Kiang representing the plaintiff, Dato' Low Hock Peng representing himself and the 9th defendant, Tan Sri Tan

Kok Ping representing himself and the 5th, 6th and 11th defendants, (c) that it was agreed, *inter alia*, that all parties shall pay a brokerage commission of RM500,000 to the plaintiff, the principal of Lim Hun Kiang, (d) that all parties respectively deposited the purchase consideration and brokerage commission (together RM5,035,025) with the stakeholder – the 3rd defendant, (e) that the purchase consideration of the said was RM4,535,025 and that the balance of RM500,000 was the brokerage commission payable to the plaintiff, or, (f) that, in February 1996, the purchasers took over the management of the 1st defendant company, and that the 5th – 8th defendants were appointed directors of the 1st defendant company, and the defendants put the plaintiff to strict proof of the allegations set out in paras. 5, 8, 9, 10, 11 & 12 of the statement of claim. The purchase and payment for the said shares were all "documented" in the sale & purchase agreement dated 15 February 1996 between the 4th and 5th defendants and the former shareholders of the 1st defendant company, and "the 4th and 5th defendants were duly entitled to the management of 1st defendant company including the appointment of new directors. The defendants have no knowledge (a) that towards the end of February 1996, that a commission of RM500,000 was paid, by the 3rd defendant with the consent of the purchasers, to the plaintiff, out of the total sum deposited with the 3rd defendant, or, (b) that towards the end of March 1996, that personal difference had arisen between Lim Hun Kiang and the 7th defendant, and the 7th defendant wrongly accused Lim Hun Kiang of having cheated in the purchase of the said shares, and the defendants put the plaintiff to strict proof of the allegations set out in paras. 13, 14 & 16 of the statement of claim. The plaintiff is not entitled to 90,750 shares in the capital of the 1st defendant company, and the defendants put the plaintiff to strict proof of its claim.

It would appear from the pleadings, and it was not denied nor controverted, that the plaintiff had indeed paid over a sum of RM500,000. On that issue, there could be no dispute, the dispute being the reason that it was handed over. According to the plaintiff, that RM500,000 was deposited as its purchase price for 90,750 shares of 10% of the issued share capital of the 1st defendant company, and that a brokerage commission of RM500,000 was subsequently paid, by the 3rd defendant with the consent of the purchasers, to the plaintiff. However, according to the defendant, a sum of RM500,000 was refunded by the then prospective purchasers to the plaintiff.

Given those pleadings, could it be said, just by looking at the pleadings alone, that the plaintiff had not disclosed a reasonable cause of action?. For a start, the issue is not one entirely of law as could be decided without the rigmarole of a full trial. Rather, the contentious issue is entirely one

of fact, and an exceedingly contentious fact at that. The plaintiff averred that it participated in the purchase of the entire share capital of the 1st defendant company, and that it deposited RM500,000, towards its purchase of 90,750 shares or 10% of the issued share capital of the 1st defendant, with the 3rd defendant who acted as advisor, "middleman" and stakeholder in the sale of the shares of the 1st defendant company. The plaintiff averred that the 4th and 5th defendants entered into the agreement purchasing the shares in the capital of the 1st defendant company as agents and or nominees of the plaintiff, 7th, 9th and 11th defendants, and that a commission of RM500,000 was subsequently paid to the plaintiff. All that was categorically denied by the defendants who contemptuously demanded strict proof from the plaintiff. Nevertheless, albeit the denials, it was admitted in the defence, (the effect of the pleading – see para. 9 of the defence), that the 4th and 5th defendants had entered into an agreement, dated 5 February 1996, purchasing the shares in the capital of the 1st defendant company. Any other than the bare averment to the effect that para. 16 of the statement of claim "is inconsistent", it was not denied at all that the issued share capital of the 1st defendant company, after execution of the agreement dated 15 February 1996, was indeed registered as follows: (a) 8th defendant – 1 share, (b) 7th defendant – 1 share, (c) 5th defendant – 1 share, (d) 6th defendant – 2 shares, (e) 11th defendant – 898,000 shares, and, (f) Tan Koon Gaik – 9,000 shares.

Perhaps it was not appreciated, but those pleadings suggest, more definitely than not, that the 4th and 5th defendants had entered into the agreement dated 15 February 1996 as agents and or nominees, as the issued share capital of the 1st defendant company, after execution of the agreement dated 15 February 1996, was registered most substantially in the names of parties who were not parties to the agreement dated 15 February 1996 and just nominally (one share) in the name of the 5th defendant. Indeed, going by the pleadings, not a single share after purchase was registered in the name of the 4th defendant who was supposed to have purchased, together with the 5th defendant, the entire issued share capital of the 1st defendant company. And that should not be so – ie shares after purchase registered substantially with non-contracting parties (7th, 8th, 11th defendants) and just nominally with one of the contracting parties (5th defendant) if the 4th and 5th defendants were principals and not agents or nominees. Quite clearly, again going by the pleadings, the plaintiff's allegation that the 4th and 5th defendants contracted as agents and or nominees is not just an allegation but a common pleaded fact. And so, could it be said, with that common pleaded fact, that the plaintiff's allegation that the 4th and 5th defendants contracted as agents and or nominees for the plaintiff, 7th, 8th and 11th defendants is a bare allegation

without any basis whatsoever. And could it be said, with the further common pleaded fact (see para. 11 of the statement of claim and para. 2(a) of the defence) that the plaintiff paid a sum of RM500,000 towards some purchase of the shares of the 1st defendant company, even though the specific allegation that it was paid to the 3rd defendant as stakeholder is disputed by the defendants, that it is plain and obvious, just by looking, of course, at the pleadings alone, that the plaintiff had not disclosed a reasonable cause of action?.

A reasonable cause of action is as Mohd. Dzaiddin J, (as he then was) explained in *Penang Development Corporation v. Khaw Chin Boo & Anor* [1993] 3 CLJ 167; [1993] 2 MLJ 161, adopting the enunciation of Lord Pearson in *Drummond-Jackson v. British Medical Association & Ors* [1970] 1 WLR 688, "... a cause of action with some chance of success when (as required by para. (2) of the rule) only the allegations in the pleadings are considered". In *Sea Breeze Navigation Co. SA v. 'Hsing An' Owners* [1974] 1 MLJ 45, Chua J held it is not the function of the court, in an application under r. 19(1)(a), to try the issue but to decide simply whether there is a triable issue. And in *Tun Datuk Haji Mustapha bin Datuk Harun v. State Legislative Assembly of Sabah* [1993] 1 MLJ 26, it was held that a reasonable cause of action would be satisfied if a substantial issue has been raised for the court's determination and the plaintiff has some genuine interest in the remedy sought. "The mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim" (*Mallal's Supreme Court Practice* (2nd edn) para 18,29,2; see also the *English Supreme Court* 1995 para 18/19/11).

And a court will only exercise its powers to strike out pleadings (or part of a pleading: *Henry Wong Jan Fook v. John Lee & Anor* [1976] 1 MLJ 231) under any of the four grounds in r. 19(1) in plain and obvious cases, a point made repeatedly by the courts and in *Bandar Builder Sdn. Bhd. & Ors. v. UMBC* [1993] 4 CLJ 7; [1993] 3 MLJ 36, where the Supreme Court restated, (i) that the principle upon which the courts act in exercising its power under any of the four limbs in r. 19(1) is only in plain and obvious cases that recourse should be had to this summary process, (ii) that this summary process can only be adopted when it can clearly be seen that a claim or defence is on the face of it obviously unsustainable, and (iii) that that power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a cause of action or defence.

The plaintiff alleged, in the pleadings, (a) that there was a mutual agreement between the plaintiff, 7th, 9th and 11th defendants to purchase the entire issued share capital of the 1st defendant company, (b) that the plaintiff, 7th, 9th and 11th defendants deposited the purchase consideration (RM4,535,025) and brokerage commission (RM500,000) with the 3rd defendant as stakeholder, (c) that the 4th and 5th defendants entered into the purchase agreement (disclosed in the defence as being dated 15 February 1996) as agents and nominees of the plaintiff, 7th, 9th and 11th defendants, (d) that a brokerage commission of RM500,000 was paid to the plaintiff, and, (e) that the plaintiff is beneficially entitled to 90,750 shares, out of a total of 907,500 shares, in the capital of the 1st defendant company.

In the statement of defence, the defendants challenged those allegations, in the main, by unending denials and demands for proof from the plaintiff. Nonetheless, substantial issues have been raised for the court's consideration. The disputed issues of fact, *inter alia*, whether the 4th and 5th defendants were nominees of the plaintiff, 7th, 9th and 11th defendants, whether a brokerage commission was payable and or paid to the plaintiff, or was it a refund and by then prospective purchasers to the plaintiff, cannot be tried at this stage. It is premature, too soon really to say without the rigmarole of a full trial where there would be an opportunity for cross-examination, that the plaintiff had not disclosed a reasonable cause of action. Evidently, it is not plain and obvious, when considering the pleadings alone, that the plaintiff's action is unsustainable and has no chance of success. For it might well be proved, at the trial that the 4th and 5th defendants were indeed agents or nominees of the plaintiff, 7th, 9th and 11th defendants. After all, the defendants incessantly demanded for strict proof, and it is only fair that the plaintiff be given an opportunity to prove its claim.

The defendants contended, as a legal issue, that Lim Hun Kiang, an undischarged bankrupt, could not do any of the alleged acts on behalf of the plaintiff. Their counsel, Mr. K.P. Tan, who did not submit that the plaintiff had not disclosed a reasonable cause of action, submitted that s. 38 of the Bankruptcy Act prohibited the alleged acts by Lim Hun Kiang, and that there is no statutory provision to save the act of a bankrupt. According to Mr. Tan, the case of *Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd.* [1995] 4 CLJ 300; [1995] 3 MLJ 313 is authority that the acts of Lim Hun Kiang are unenforceable. The plaintiff could not rely on the acts of a bankrupt. "By implication", Mr Tan further submitted, "because (Lim Hun Kiang) was prohibited from acting in contravention of s. 38 of the Bankruptcy Act 1967, that all his acts would be void ..." (Lim

Hun Kiang)'s appointment as a manager, by reason of s. 38, is not valid. If there was no appointment, then there were no acts". Mr Tan also drew the court's attention to the provisions of ss. 125, 127 and 133(1) of the Companies Act.

Interestingly, because the legal arguments bear comparison, in *MBf Finance Bhd lwn. Sykt Noma Pengangkutan Sdn. Bhd. & Yang Lain* [1999] 4 CLJ 234, it was argued by the guarantors/defendants that the hire-purchase agreement, because it was executed by a bankrupt (on behalf of the purchaser company), was void *ab initio* and that the guarantees therefore were also void. And as in the instant case, the defendants relied on s. 38 of the Bankruptcy Act and ss. 125 and 127 of the Companies Act. Abdul Hamid Said JC held however, on the issue whether a bankrupt could sign the hire-purchase agreement on behalf of the purchaser company, that s. 38 of the Bankruptcy Act and ss. 125 and 127 of the Companies Act were not applicable as the purchaser company's resolution merely authorised the bankrupt to execute the hire-purchase agreement, and that the hire-purchase agreement was valid and binding.

Much earlier, in *Gan Hong Hoe v. Gan Kim Hee* [1939] MLJ 295, but in the context of a bankrupt entering personally into a post bankruptcy contract, McElwaine CJ (SS) held that the now repealed Bankruptcy Enactment (Cap 55) did not enact that a bankrupt was incapable of making a contract.

With regard to the present Bankruptcy Act, according to VC George J (as he then was), in *Re: Kwan Chew Shen t/a Syarikat Kaaf* [1987] 1 CLJ 314 where it was contended that the charge created and registered after the receiving order had been made did not enjoy the protection of s. 54 of the Bankruptcy Act and therefore was void, "there appears to be no blanket provision anywhere to the effect that a bankrupt is incapable of making a contract".

However, at the other end of the spectrum, in *The Topps Co Inc v. Mally Jaya Sdn. Bhd.* [1998] 2 CLJ Supp 235; [1998] 5 MLJ 744, Low Hop Bing J held that ss. 38(1)(d) and 109(m)(ii) of the Bankruptcy Act prohibited the deponent (a bankrupt) from holding himself out in his affidavit, in the absence of previous sanction of the official assignee or court to hold that position, as a general manager, and that the deponent's contravention of those provisions had injuriously affected and vitiated the affidavit. His Lordship held, in other words, that the contravention of those statutory provisions rendered the bankrupt's act (affidavit) totally void.

The validity of a contract prohibited by statute expressly or by implication was discussed at some length in *Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd.* [1995] 4 CLJ 300; [1995] 3 MLJ 313, the case that Mr Tan said is authority that the alleged acts of Lim Hun Kiang are unenforceable. In Feyen, the chargor sought to have the charges declared illegal, void and unenforceable by reason of the breach of s. 133(1) of the Companies Act which prohibits a company, *inter alia*, from providing any guarantee or security for a loan given to its directors. The question was whether a breach of s. 133(1) of the Companies Act had any civil consequence with regard to the validity of the charges, ie whether the charges given in breach of s. 133(1) were valid and enforceable against the chargor company. The trial court decided in favour of the chargor and ordered the cancellation of the land charges.

On appeal, the Federal Court, per Edgar Joseph Jr, observed that the general rule is that where a contract is prohibited by statute expressly or by implication the contract shall be void and unenforceable, "unless the statue itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. However, the Federal Court also observed that there appears to be a trend in decisions whereby courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision, that s. 133 of the Companies Act does not say that a guarantee entered into or any security given in contravention thereof is to be void, and that s. 133(5) implies that a company may incur civil liability under s. 133(1), notwithstanding that a guarantee or security given by a company may have contravened the same said s. 133(1).

But significantly, the Federal Court quoted with approval the following judgment, of Gibbs CJ on *Yango Pastoral Co Pty v. First Chicago Australia Ltd* [1978] 139 CLR 410:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. The statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet as to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which statute prohibits a contract but nevertheless reveals an intention that it be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed. (emphasis added).

In the event, having regard to the context and purpose of s. 133(1) and the principle underlying s. 133(5), the Federal Court held that no civil consequences flowed from a breach of s. 133, that is to say, no voidness or unenforceability attached to the loan or the charge transaction.

Then, it is not settled at all, given those observations of the Federal Court, that Lim Hun Kiang, an undischarged bankrupt, could not do any of the alleged acts on behalf of the plaintiff company. And it is not incontestable, even if Lim Hun Kiang could not do any of the alleged acts on behalf of the plaintiff company, that the alleged transaction reached by the said Lim Hun Kiang on behalf of the plaintiff are unenforceable. Section 38 of the Bankruptcy Act undoubtedly provides that an undischarged bankrupt "shall not, except with the previous permission of the official assignee or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company". And s. 125 of the Bankruptcy Act imposes the penalty upon a breach of s. 38. Yet it is not plain and obvious, not clear-cut at all judging from the above short survey of the authorities, that the Bankruptcy Act prohibits a contract reached by a bankrupt on behalf of his principal in the sense as to render it void and unenforceable. Rather, at first brush, it appears the stronger case that the Act intends only the penalty it provides (s. 125). And Mr Balasundram's arguments that there was no provision in the Bankruptcy Act prohibiting Lim from representing. The plaintiff and that the agreement reached by Lim (on behalf of the plaintiff) is not void and cannot be summarily dismissed just out of hand.

This is not a plain and obvious case for striking out the pleading as disclosing no reasonable cause of action and defence. The issues of fact and law raised in this appeal should be tried. In the premises, this appeal is allowed with costs.